

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

74-1011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

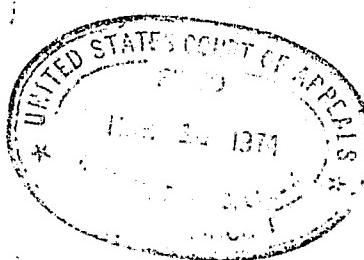
Docket No. 74-1011

JESSE PEARSON,

Appellant.

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APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLLIS SKLOOT BAMBERGER,
Of Counsel

Sale

Fine,

Clerk

Mass

Attor

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3/30

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TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U.S.:

vs.

THOMAS BUTTAFUOCO,
 JESSIE PEARSON,
 ANTHONY POLITO and
 PATRICK RAYLL

For Defendant: RAYLL: H.E. WALES

747-36c 299 Broadway, N.Y.C.

4F21-1993 (227-3830)

Sale or receipt of stolen goods.

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine, Buttafuoco	1,000 00	12-23-73	Notice of Appeal (No fee)	5 -	
Fine, Politto	2,500 00	1-7-74	Paula T. Tucci		
Marshal, Pearson	1,000 00	12-23-73	Notice of Appeal (No fee)		
Attorney,			Rayll		
Commissioner's Court,		12-28-73	Notice of Appeal (No fee)		
Witnesses,			Pearson		
		1-7-74	Notice of Appeal (No fee)	5 -	
		1-8-74	Paid to Tucci (No fee)		5 -

DATE	PROCEEDINGS
3/8/73	Before COSTANTINO, J. - Indictment filed.
3/16/73	Before ROSLING, J. - Case called- Defts present-Only deft RAYAL not present but his atty is present-Bench Warrant ordered for RAYLL-Defts BUTTAFUOCO, PEARSON and POLITO arraigned and enter pleas of not guilty-Bail cont'd as to all defts-Case marked ready and passed-Motions to be made on statutory time.
3/19/73	Notice of Readiness for Trial filed.
3-21-73	Magistrate's files 72 M 1774 and 73 M 393, and 73 M 401 inserted into Cr file.
3/26/73	Petition for for Writ of Habeas Corpus Ad Prosequendum filed. (RAYLL)
3/26/73	By ROSLING, J. - Writ issued , ret. 3/30/73.
3/30/73	Notice of Appearance filed.
3/30/73	By ROSLING, J. - Order filed, appointing counsel.

10-2-73

73CR 244

DATE	PROCEEDINGS
3/30/73	Before ROSLING, J.- Case called- Deft present and without counsel-Court court assigned H.E. WALES as counsel for deft RAYLL-Order appointing cou signed-Copies given to the atty-Deft arraigned and enters a plea of not Statuatory time for motions-Bail fixed at \$10,000.00 cash or surety-Case marked ready and passed.
4/3/73	Writ retd andfiled. Executed. (BUTTAFUOCO)
4/9/73	Notice of Motion for Discovery and inspection-Rule 16 FRCRP filed, Notice Motion to suppress evidence illegally obtained-Rule 41, FRCRP filed, Notice of Motion for Bill of Particulars Rule 7 filed, all motions ret. 4/13/73
4/11/73	Affidavit of Service filed (for motions of 4/9/73) from LILLIAN KURTZER.
5/4/73	Before JUDD, J.- Case called-Deft BEARSON present w/o counsel-All other de not present-Order appointing counsel & signed-Pre-Trial held and concluded Case adjd to 9/5/73 for Suppression-Hearing and to 9/10/73 for trial.
5/4/73	By JUDD, J.- Order appointing counsel filed. (for J. PEARSON)
8-3-73	Govts answers to Demands for Particulars and Discovery filed. (P.RAYLL)
8/3/73	Letter from chambers dated 8/3/73 from H. Elliot Wales, filed- re:P. RAYLL
8/8/73	By, JUDD,J.- Order filed reducing bail to \$5,000 surety bond(copies sent AUSA Schlam and counsel) Deft. RAYLL
9-17-73	Before Judd J - Case called - defts & counsels present - adjd to 9-24-73 for trial.
9-24-73	Before Judd J - Case called - defts & counsels present - Wade Hearing begun - all motions to suppress argued. - wade hearing concluded - Decision Reserved - all other suppression motions denied - trial ordered and Begun. Jurors selected and sworn - Govt opens - All defts open - 2nd Wade Hearing Begun - All Wade Hearing motions to suppress are denied - Trial continued to 9-25-73.
9-25-73	Before Judd J - Case called - defts & counsels present - trial resumed - Stipulation read into Record - Govt rests - defts motion to dismiss the Indictment - all motions denied - Trial contd to 9-26-73.
9/26/73	Before JUDD, J. - Case called- Defts and counsel present-Trial resumed-Juror #6 excused-Deft BUTTAFUOCO rests-Deft POLITO rests-Deft PEARSON rests- Deft RAYLL rests-Govt opens on Rebuttal-Trial cont'd to 10/1/73
10/1/73	Magistrates file 73M1231 inserted into Criminal file 73CR244
10/1/73	Before JUDD, J.- Case called- Defts and counsel present- Trial resumed- Deft Pearson's motion to add trial for 1 day in order to find a potential witness- Motion granted- Trial contd to 10/2/73

DATE	PROCEEDINGS
10-2-73	Before JUDD, J - Case called - defts & counsels present - Trial resumed - defts motions to dismiss and for Judgments of Acquittal - Motions denied - defts sum up - Govt sums up - deft RAYLL's motion for mistrial - motion denied - Judge charges Jury - Marshals sworn - alternate discharged - Jury retires to deliberate at 2:45 PM - Case adjd to Oct. 3, 1973.
10-3-73	Before JUDD, J - Case called - defts & counsels present - Trial resumed - Jury resumes deliberations at 9:30 am. Order of Sustenance signed - Jury returns at 5:00 PM and renders verdict of guilty as charged as to all defts - Jury discharged - Trial concluded - Defts motions to set aside verdict - Motions denied - Bail contd as to all defts - adjd without date for sentencing.
10-3-73	By JUDD, J - Order of Sustenance filed.
10-3-73	5 Stenographers transcripts filed (pgs 1 to 618)
10/5/73	Memo To U.S. Marshal from Judge Judd and reply on back of memo filed re:Buttafuoco
10-11-73	Voucher for compensation of counsel filed (RAYLL) & affidavit in support
10-11-73	2 stenographers transcripts filed one dated Oct. 2 and one dated etc. Oct. 3, 1973 (pgs 619 to 799)
11-21-73	Voucher for expert services filed (RAYLL)
12-28-73	Before JUDD, J. - Case called- Defts and counsels present- Deft POLITO sentenced to imprisonment for a period of 2½ years. The deft is fined \$2,500.00 and execution of sentence is stayed pending appeal Deft advised of his right to appeal- Bail conditions contd- Deft BUTTAFUOCO sentenced to imprisonment for a period of 2 years- Deft to serve 6 months and execution of balance of sentence is suspended and the deft is placed on probation for a period of 2 years- deft is fined \$1,000.00 and execution of sentence is stayed pending appeal- deft advised of right to appeal- Bail conditions contd- Deft RAYLL sentenced to imprisonment for a period of 4 years pursuant to T-18 U.S.C. Sec. 4208(a)(1) with eligibility for parole after 1 year- deft contd on \$2,500.00 bail pending appeal- Clerk to file notice of appeal in forma pauperis on behalf of deft- Deft to post new bail bond by 1-2-74- Deft PEARSON sentenced to imprisonment for a period of 1 year deft to serve 60 days on 3 day weekends and balance of sentence is suspended and the deft is placed on probation for a period of 2 years deft is fined \$1,000.00 and execution of sentence is stayed pending

DATE	PROCEEDINGS
	appeal- Deft advised of right to appeal and Clerk to filed notice of appeal in forma pauperis on behalf of deft- Bail conditions contd
2-28-73	Judgment and Commitment and Orders of Probation filed- certified copies to Marshal and Probation(BUTTAFUICI AND PEARSON)
2-28-73	Judgment and Commitment filed- certified copies to Marshal(POLITO AND RAYLL)
2-28-73	Notice of appeals filed (RAYLL, POLITICO AND PEARSON)
2-28-73	Docket entries and duplicate of notice of appeals mailed to Court of Appeal (RAYLL, POLITICO AND PEARSON)
1-7-74	Notice of Appeal filed(BUTTAFUOCO)
1-7-74	Docket entries and duplicate of Notice mailed to C of A with Form A (BUTTAFUOCO)
1-10-74	3 Orders received from the Court of Appeals and filed that records be docketed on or before 1-27-74(BUTTAFUOCO, POLITICO AND PEARSON)

A TRIP CO	1/17/74
LEWIS	1/17/74
BY	1/17/74

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-X 73 CR 244

UNITED STATES OF AMERICA

-against-

THOMAS BUTTAFUOCO,
JESSIE PEARSON,
ANTHONY POLITO, and
PATRICK RAYLL,

IN CLERK'S OFFICE
U. DISTRICT COURT E.D. N.Y.

INDICTMENT

Cr. No.

MAR 8 - 1973

(T. 18 U.S.C. §2315
and §2).

TIME A.M.
P.M.

Defendants.

-X

THE GRAND JURY CHARGES:

In or about August, 1972, in the Eastern
District of New York, the defendants:

THOMAS BUTTAFUOCO
JESSIE PEARSON
ANTHONY POLITO and
PATRICK RAYLL,

together with Ira Kirschner, not named as a defendant
herein, wilfully and unlawfully received and concealed
a quantity of stolen Colgate-Palmolive articles, of a
value of approximately One Hundred and Ten Thousand
Dollars (\$110,000.00), which articles were moving as
a part of and constituted interstate commerce from
Elizabeth, New Jersey to Plainview, New York, knowing
the same to have been stolen. (Title 18 United States
Code, Section 2315 and Section 2).

A TRUE BILL.

James A. Farley | FOREMAN.

P. J. F. A. Mohr, USAs
UNITED STATES ATTORNEY

1 A F T E R N O O N S E S S I O N

2 (2:00 o'clock P.M.)

3 (The following took place in the absence

4 of the jury:)

5 THE COURT: All right, we are all ready.

6 I think we will bring the jury in.

7 (Whereupon, the jury entered the courtroom.)

8 THE COURT: Mr. Schlam and counsel for
9 the defendant, Mr. Rodner and ladies and
10 gentlemen of the jury:11 Now that you have heard the evidence
12 and the arguments of counsel, it's my duty
13 to give you the instructions of the Court as
14 to the law that applies to the case. I will
15 put it together from a lot of written papers
16 so as to be as accurate as I can be.17 My practice first is to describe the
18 general principles that apply to all criminal
19 trials, then the nature of the charge in
20 this case, and the specific rules of law which
21 apply to them and to the evidence that you
22 have heard, and then something about the
23 evidence and something about how to go about
24 reaching a verdict.

25 It is your duty as jurors to follow the

JB:pc
take 1/1

2 Charge

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2 law as I state it and to apply the rules of
3 law that I give to the facts as you find them
4 from the evidence. You are the sole judges
5 of the facts. Whatever counsel have stated,
6 and even whatever I state in my instructions,
7 is not binding on you. It's your recollection
8 and your decision that governs.

9 You are to perform your duty without
10 bias or prejudice for or against any party.
11 The law doesn't permit jurors to be governed
12 by sympathy or prejudice or public opinion.

13 At the start the law presumes that a
14 defendant is innocent of crime, and that
15 presumption stays until you have reached a
16 verdict. The law permits nothing but legal
17 evidence presented before a jury to be considered
18 in support of a charge. The presumption of
19 innocence is enough in itself to acquit a
20 defendant unless 12 jurors are satisfied beyond
21 a reasonable doubt of the defendant's guilt
22 from all the evidence in the case.

23 I will say a few words about what the
24 law means by a reasonable doubt. A reasonable
25 doubt is a fair doubt based on reason and

1 Charge

2 common sense arising from the state of the
3 evidence or from the absence of evidence.

4 A reasonable doubt doesn't mean a doubt
5 that a juror asserts arbitrarily or capriciously
6 because of sympathy or because he doesn't
7 want to perform an unpleasant task. It doesn't
8 mean a possible doubt because we can rarely
9 prove anything to an absolute certainty. And
10 the law doesn't require that.

11 A description that is often given and
12 it's in line with what counsel have told you
13 is that proof beyond a reasonable doubt
14 refers to a doubt such as would make you
15 hesitate to act in your own important affairs.
16 And you do that as you go through life you
17 have to decide things like marriage, school
18 selection, house purchase, other important
19 matters, and after listening to a lot of
20 different people, you make up your own mind.
21 And a reasonable doubt is a doubt such as would make
22 you hesitate to act in your own important
23 affairs.

24 This proof beyond a reasonable doubt
25 operates on the whole case. It doesn't

1 Charge

4 2 mean that each bit of evidence must be proved
3 beyond a reasonable doubt. It means that the
4 sum total of all the evidence, direct and
5 cross for both sides, must satisfy you beyond
6 a reasonable doubt as to each element of the
7 crime charged or else you must acquit.

8 Finding a person to be guilty of a
9 felony is a serious matter. And you can
10 consider that fact in determining whether
11 there is a reasonable doubt.

12 But if you are convinced beyond a reasonable
13 doubt, it's your duty to convict, just as it's
14 your duty to find a verdict of not guilty
15 if you have a reasonable doubt at the end of
16 all your deliberations.

17 An indictment, as I said at the beginning,
18 is just a formal method of accusing a defendant
19 of crime. It's not any evidence that any
20 defendant did anything. It doesn't permit any
21 inference of guilt.

22 The four defendants have pleaded not
23 guilty. The indictment and these pleas
24 create the issues which you must decide.

25 The law never imposes a duty on a

1 Charge

2 defendant in a criminal case to produce any
3 evidence. He can take the position that the
4 Government hasn't carried its burden of proving
5 his guilt beyond a reasonable doubt.

6 A defendant has a constitutional right
7 to testify or not to testify as he sees fit.
8 If he doesn't testify, it's no evidence of any
9 kind of guilt or wrongdoing. You are not to
10 consider or discuss the fact that a particular
11 defendant chose not to testify, and you
12 shouldn't even mention it in your deliberations.

13 We have had three defendants who did
14 testify. Their testimony must be weighed just
15 like that of any other witness. You can consider
16 that a defendant, if he is guilty of crime, has
17 a motive to lie to protect himself. But you
18 also consider that when he gets on the witness
19 stand he is subject to cross examination and
20 a lot of matters can be brought up and he runs
21 a risk. And so you determine the weight that
22 you will give to the testimony of a defendant
23 as part of all the proof in the case.

24 When you are analyzing the evidence
25 you can draw reasonable inferences from the

1 Charge

6 evidence based on your own common sense and
7 general experience. You are not confined to
8 the bare bones of the evidence, but you
9 can't speculate. You can only draw inferences
10 from facts that you find have been proved.

11 The indictment in this case charges
12 that in or about August, 1972 and in the
13 Eastern District of New York, the defendants
14 Thomas Buttafuoco, Jesse Pearson, Anthony Polito
15 and Patrick Rayll, together with Ira Kirschner,
16 not named as a defendant herein, wilfully
17 and unlawfully received and concealed a
18 quantity of stolen Colgate-Palmolive articles,
19 of a value of approximately 110,000 dollars,
20 which articles were moving as a part of and
21 constituting interstate commerce from Elizabeth,
22 New Jersey to Plainville, New York, knowing
23 the same to have been stolen.

24 The indictment is based on section 2315
25 and section 2 of the United States Code.

26 And section 2315 says that whoever
27 receives, conceals, stores, barters, sells or
28 disposes of any goods, wares or merchandise,
29 securities or money of the value of \$5,000 or

6

1 Charge

2 more, moving as or which are a part of
3 interstate or foreign commerce, knowing the
4 same to have been stolen, shall be fined or
5 imprisoned.

6 And I don't go into the amount of
7 the penalty because that is for me to determine
8 at the conclusion of the case if there is a
9 guilty verdict on the basis of all the facts
10 that may have been presented to me by counsel
11 and probation at that time.

12 The indictment also refers to section
13 2 of Title 18 which says: "Whoever commits an
14 offense against the United States or aids,
15 abets, counsels, commands, induces or procures
16 its commission, is punishable as a principal.

17 That means that somebody who helps
18 commit a crime is just as guilty as the one
19 who does it personally provided that he knows
20 what he is doing.

21 One of the rules that is given with
22 respect to that by the Supreme Court is that
23 a defendant to be guilty of aiding and
24 abetting must in some way associate himself
25 with the venture, participate in it as something

1 Charge

2 that he wishes to bring about, that he seeks
3 by his actions to make it succeed.

4 In order to find that a defendant is
5 guilty of receiving or concealing goods stolen
6 from foreign commerce, there are five elements
7 that must be proved by the Government, each
8 beyond a reasonable doubt. First, that there
9 was a stealing or unlawful taking.

10 Second, that the goods were moving as
11 part of an interstate shipment.

12 Third, that the defendant received
13 or concealed the goods.

14 Fourth, that he knew they were stolen.

15 And fifth, that they were worth more
16 than \$5,000.

17 I will go briefly into the application
18 of these elements to the facts that have been
19 the subject of testimony.

20 The stipulation of facts in the case
21 simplify the issue by substantially removing
22 any dispute on three of the elements. There
23 is a stipulation that a witness, if called to
24 testify, would say that a truck containing
25 Colgate merchandise was stolen on or about

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Charge

2 August 28th, 1972, and that that was the truck
3 that came to Long Island, which would be an
4 interstate shipment, and that the contents
5 were worth more than \$5,000. The Government
6 doesn't have to prove that it was worth \$110,000
7 as stated in the indictment. It merely has
8 to show the statutory amount of \$5,000 or more
9 that was involved.

9

10 So if you accept those facts, you can
11 find three of the elements: that there was
12 a stealing; that there was interstate shipment;
13 and that the goods were worth more than \$5,000.

14 With respect to the receipt or
15 concealment: receipt involves something in the
16 nature of possession. And so we use a
17 definition of possession.

18 The law recognizes two kinds of possession:
19 actual possession and constructive possession.

20 A person who knowingly has direct,
21 physical control over a thing at a given
22 time is then in actual possession of it. A
23 person who, although not in actual possession
24 has the power and the intention to exercise
25 control over a thing either directly or through

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Charge

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2 another person is then in constructive
3 possession.

4 Possession may be sole or joint. Two
5 or more persons can share actual or constructive
6 possession of a thing. So that it would be
7 possible, if you find it for all four of the
8 defendants to have been in possession and to
9 have taken part in the receipt and concealment
10 of these goods, if you find beyond a reasonable
11 doubt that they were present in the IMK warehouse
12 on the evening of August 28th.

13 It's not necessary to prove that the
14 defendants knew the property was stolen from
15 a foreign shipment. It's enough to be shown
16 that the property was stolen. But here the
17 probability is that if they knew it was stolen,
18 they knew it was from a foreign shipment.

19 In determining whether the defendant
20 had knowledge, you should consider all the
21 facts and circumstances in the case. Possession
22 of stolen property shortly after it was stolen
23 without a reasonable explanation of possession,
24 permits the inference that the defendant knew
25 the property was stolen. But it does not

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Charge

2 require a finding of knowledge.

3 So if the goods were stolen in the
4 afternoon of August 28th, and they were in
5 the possession of these defendants later
6 on in the evening on August 28th, you can infer
7 that they knew they were stolen. But you don't
8 have to infer it. And you bear in mind that
9 a defendant doesn't have to bring out any
10 testimony. The explanation may come from
11 other matters.

12 Knowing they were stolen involves an
13 element of knowledge, and knowledge is a state
14 of mind. The burden is on the prosecution to
15 prove this state of mind which is encompassed
16 in the words, "knowing the same to have been
17 stolen."

18 A person doesn't knowingly do a wrongful
19 act if the act results from a mistake or from
20 any other innocent reason. If the defendant
21 had good intentions, he cannot be guilty of a
22 crime. But he cannot deliberately close his
23 eyes to facts which point toward knowledge
24 of theft.

25 A difficult aspect of your duty is to

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1 Charge

11 2 determine the credibility of witnesses before
12 3 you and to weigh their testimony. And in
13 4 weighing their testimony, some of the facts
14 5 you can consider are a witness' bias, his
15 6 interest in the outcome of the case, his manner
16 7 while testifying, his candor, whether he looks
17 8 and sounds honest, his intelligence as you have
18 9 observed it, and the extent to which he was
19 10 in a position to know the facts he has
20 11 testified about.

21 12 You can also consider the extent to
22 13 which any testimony has been corroborated or
23 14 contradicted by other evidence. You can
24 15 consider inconsistencies within the testimony
25 16 of any witness, either on direct examination
1 17 or on cross examination, and whether any
2 18 witness has changed his testimony.

3 4 If you find that there has been a
4 5 prior statement that is inconsistent with
5 6 trial testimony, you should weigh that and
6 7 determine what effect it has.

7 8 A witness may have been mistaken
8 9 with respect to part of his testimony and be
9 10 accurate with respect to other parts. And

1 Charge

12 2 you can consider whether any misstatement is
3 material or intentional. Where you find that
4 a witness said something that is not true,
5 either as a deliberate lie or because he is
6 not careful in what he says or doesn't recall,
7 you can decide that you are not going to believe
8 anything he says, or you can decide, "well, I
9 know he was wrong on that, but there are facts
10 that bear him out on the others," and it's
11 within the province of the jury to determine
12 how much of a witness' testimony to believe
13 where there are untruths or where there are
14 inconsistencies.

15 (continued on the next page.)

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2 We have had some -- one Government witness
3 at least testified in the case. You are not to
4 give any greater weight or credibility to the
5 testimony of a witness solely because of the
6 fact that he is a Government agent. You are
7 not to give it any less weight. You evaluate
8 the testimony of a Government agent in the
9 same manner as you would evaluate the testimony
10 of any other witness.

11 We have four defendants here. You are
12 to consider the case separately with respect to
13 each defendant. The issue of guilt or innocence
14 is personal to each verdict. And your verdict
15 as to one defendant is not to be affected as
16 to the other defendants. In your deliberations
17 you consider only the evidence that relates to
18 each defendant.

19 Now, we have what is called accomplice
20 testimony here. Mr. Kirschner testified that he
21 knew he was getting stolen goods. That makes
22 him an accomplice. Somebody who participated in
23 criminal transactions that are the subject matter
24 of the case.

25 When you evaluate the testimony of an

2 accomplice you should consider that testimony
3 with caution and receive it and evaluate it with
4 great care. The fact that a witness has admitted
5 that he has committed a serious crime may show
6 a defect in his character, may make him more
7 likely to lie than other people. And if he is
8 going to try to avoid prosecution he may try
9 to court the favor of the prosecution by impli-
10 cating the defendants on trial. And you can
11 consider all that.

You consider also the extent to which
Mr. Kirschner's testimony is corroborated or
contradicted by other evidence. The law doesn't
require that accomplice testimony be corroborated.
You can decide a case solely on the testimony
of Mr. Kirschner if you believe it beyond a rea-
sonable doubt. But you should consider all the
facts in the case and the extent to which they
bear out or fail to bear out what he said, the
extent to which has been corroborated by other
witnesses or by exhibits or other evidence.

23 And I mention motive. You can bear in
24 mind that Mr. Kirschner has not been indicted
25 in this case, although he committed a crime, in

2 determining whether that constitutes a reason
3 to disbelieve his testimony about the other
4 defendants or whether weighing it all you still
5 find that there is sufficient evidence of guilt.

6 Now, there are a few other rules that
7 apply here. One is what we call false exculpa-
8 tory evidence. There was testimony by Mr. Polito
9 that he didn't know Mr. Pearson, and by
10 Mr. Pearson that he was down in North Carolina
11 at the time that this took place. And the
12 Government tried to show that those facts were
13 not true.

14 Statements made by a defendant may be
15 considered in the light of all the other evidence
16 in the case in determining guilt or innocence.
17 When a defendant offers an explanation or makes
18 a statement tending to show innocence, and the
19 explanation or statement is later shown to be
20 false, the jury may consider whether this is
21 circumstantial evidence pointing to consciousness
22 of guilt.

23 Ordinarily it's reasonable to infer an
24 innocent person wouldn't find it necessary to
25 invent an explanation tending to establish his

Charge

2 innocence. But whether or not a statement is
3 true or whether or not it's false, if it isn't
4 true, points to guilt, it is a matter exclu-
5 sively within the province of the jury, always
6 bearing in mind that there is no duty on a defen-
7 dant in a criminal case to call any witnesses
8 or produce any evidence.

9 We have had character testimony here.
10 And there is a rule with respect to that which
11 I will read you.

12 Where a defendant has offered evidence
13 of good general reputation for truth and
14 veracity -- and really it is not character testi-
15 mony. It's reputation, although we call it
16 character testimony.

Where a defendant has offered evidence
of good general reputation for truth or veracity
or as a law-abiding citizen, the jury should
consider such evidence along with all the other
evidence in the case.

22 Evidence of a defendant's reputation
23 inconsistent with those traits of character
24 ordinarily involved in the commission of the
25 crime charged may give rise to a reasonable doubt

2 since the jury may think it's improbable that a
3 person of good character in respect to those
4 traits would commit such a crime.

5 Now, we had some business records that
6 were offered here, too. And there is a special
7 rule with respect to those.

8 Whether Mr. Pearson was in North Carolina
9 on August 28th or on August 31st may depend on
10 the weight that you give to the documents which
11 Mr. Joyner brought here, which was a photocopy
12 of a shipping document with the date 8/31 on it.

13 The statute says that a memorandum may
14 be received in evidence if it was the regular
15 course of business to make such memorandum or
16 record at the time of such transaction, occur-
17 ^{ence}
18 after or other circumstances of the making of
19 such writing or record, including lack of per-
20 sonal knowledge by the entrant or maker, may be
21 shown to affect its weight. But such circumstance
22 shall not affect its admissibility.

23 In other words, you can consider that in
24 determining whether the fact that Mr. Joyner didn't
25 make the note himself and had only a supervisory

2 capacity casts doubt on it and what effect that
3 has on the truth of Mr. Pearson's statement.

4 Now, a federal judge is permitted to
5 comment on evidence providing he makes it clear
6 that the ultimate decision rests with the jury.
7 And I have found that one of the ways that I
8 think I can be helpful after you have heard
9 argumentative presentations from both sides is
10 to give a chronology which tells the story as
11 I have noted it in order instead of argumenta-
12 tively.

13 Back in 1968 Mr. Kirschner and Mr. Buttafuoco
14 met at Floyd Bennett Field where they both were
15 engaged in business. In 1969 or 1970 Mr. Polito
16 met Mr. Rayll, according to Polito's testimony.

17 And there was some testimony by him that Mr. Rayll
18 used to come to the pier, that he thought he
19 was in the plastics business.

20 Mr. Buttafuoco said he met Kirschner again
21 in the summer of 1971 and bought some toothpaste
22 from him, and that he took Rayll to meet Kirschner
23 in November of 1971, and Rayll bought candy and
24 radios, things which Mr. Kirschner denied.

25 There is evidence that on December 10, 1971,

2 Mr. Buttafuoco bought three radios from Mr.
3 Kirschner and paid for them with a check. And
4 Kirschner originally said, "I never sold any
5 radios. I just cashed a check."

6 And finally he said, "I don't recall
7 whether it took place or not."

8 And that is one of the instances where you
9 may determine that Mr. Kirschner told an untruth.
10 And you will have to decide, if you do believe
11 that, whether that affects all his testimony or
12 whether you think he was just trying to cover
13 himself on that, and the rest of what he said
14 may nevertheless be true.

15 Buttafuoco said that he went with Rayll
16 to Mr. Kirschner in February of 1972 to talk
17 about the complaint -- he thought it was a com-
18 plaint on the radios.

19 (Continued on next page.)

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THE COURT: (Continuing.) Mr. Kirschner

3 said the first time after 1969 that he met
4 Buttafuoco was in June of '72, in Plainview, when
5 they talked about how good the trucking business
6 was and either how bad Kirschner's business was, or
7 how good it was, as Mr. Buttafuoco said.

8 And it was June 20th, 1972, according to
9 the documents, that Mr. Buttafuoco bought a
10 Volkswagen from Mr. Polito, whom he said he had
11 not known before but met through Mr. Rayll.

12 Kirschner says Buttafuoco brought Rayll
13 to the warehouse in July of '72, as a man who could
14 do you some good, and they looked over the warehouse
15 and that Rayll made some inquiries, and that late
16 in July Rayll brought Polito around and Kirschner
17 said that's the first time he met him and he talked
18 about the trucks and the good load.

19 Polito says that this was not in the daytime,
20 that he went at night to see Mr. Kirschner, during
21 July, to talk -- to discuss a loan.

22 There is no evidence -- no testimony that
23 the loan was ever made, so if they did discuss it,
24 it probably was not made.

25 In August of '72, Kirschner testified that

2 in the early part of the month, middle of the month,
3 Rayll said he had had a load and he couldn't reach
4 Mr. Kirschner but he'd try again.

5 And then we come to August 28th, when there
6 were a whole lot of things that happened. There
7 was a phone call from the Rayburn telephone number
8 to the Schiavone-Fitzpatrick telephone number at
9 12:55 P.M. on that day. That's Mr. Polito's office,
10 but there is no evidence that he was there.

11 At 5 o'clock, a truck was stolen from the
12 Jones Trucking Company yards.

13 At 5:30 there was a toll call from Mr. Polito's
14 number to Mr. Buttafuoco's office.

15 At 6 o'clock Mr. Kirschner says there was a
16 phone call to him at his warehouse from Mr. Buttafuoco,
17 that Tony was coming, and while Mr. Kirschner says
18 it's no good coming at night, his testimony is that
19 he did come.

20 At 6:30 Mr. Kirschner said he had a phone
21 call from Rayll asking if he had heard from Tony
22 and he said he hadn't heard yet.

23 The telephone toll records indicate that at
24 6:38 a call from Rayll to Polito's home in New Jersey;
25 at 6:50 from Rayll to IMK and at 7:01 another call,

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2 to Polito's home.

3 At 7 o'clock Mr. -- about 7, Mr. Kirschner
4 said he had a phone call from Polito that he was in
5 New Jersey and was going to bring a load.

6 There was some comment about Mr. Schlam's
7 statement that Mr. Polito was calling from the
8 Rayburn yard and that he was with the truck in the
9 yard.

10 I think he was asking you to draw that
11 inference from the fact that he said he was in New
12 Jersey, but I do not think the testimony showed
13 where in New Jersey he was at that time.

14 According to Mr. Kirschner's testimony, he
15 was at Mr. Rayll's home from 7 until about 9 o'clock
16 and when he got back to the warehouse around 9, Mr.
17 Buttafuoco drove up almost immediately in a Cadillac.

18 Mr. Buttafuoco said he had a Cadillac but
19 he did not drive the Cadillac that night. He was
20 driving an old -- I do not know whether a Chevy,
21 but an old small car. And almost immediately there-
22 after, according to Mr. Kirschner, a forty foot
23 trailer drove up with Mr. Polito and Mr. Pearson in
24 it, and they unloaded about 4300 cases on palletts
25 and took about five hours to do it.

2 Well, that means they would have been doing
3 about 800 cases an hour, by hand, without a fork
4 lift and with this pallett jack that Mr. Kirschner
5 told about, if they did it.

6 There was a telephone call from IMK to Mr.
7 Polito's residence at 10:50 that night, according
8 to the toll records. Mr. Polito says, well, that
9 is because I had an appointment there and I did not
10 show up and Mr. Kirschner must have been calling to
11 find out why I was not there.

12 You can determine whether that is a fair
13 explanation and whether it supports Mr. Polito's
14 statement that there is no credible evidence that
15 he was there at that time.

16 Now, about 2:30 A.M., according to Mr.
17 Kirschner, Tony Polito left after inquiring about
18 all night diner and Mr. Pearson was with him in
19 the truck, and there is a telephone toll message
20 at 3:34 A.M., from Mr. Pearson's home in New Jersey
21 to Mr. Berrico, who was described as one of the
22 dispatchers for Rayburn.

23 Mr. Pearson testified that he left 5 o'clock
24 Sunday night, August 27th, for Rocky Mount, North
25 Carolina; it was a fourteen hour drive; that he

2 arrived there 8 or 9 o'clock and had to wait until
3 11 o'clock or so before he unloaded his truck.

4 He said he did not get a receipt, although
5 Mr. Joyner said that it was the practice to give
6 receipts to the truck drivers when they brought
7 things in.

8 And Mr. Joyner says that the only truck
9 that arrived -- there wasn't any truck on August
10 28th, there was one on August 29th, from Coastal
11 Trucking, and that a Colgate load arrived on August
12 31, and he does not know whether Mr. Pearson was
13 there or not. He did not identify the signature
14 particularly.

15 Now, August 29th, Mr. Kirschner says he
16 started to tidy up his warehouse, make an inventory
17 of what he said he had bought the night before, and
18 he told his employees when they asked him where did
19 all these goods come from, none of your business.

20 And later in the day he called Mr. Ertman
21 in Bayshore and he says Mr. Ertman agreed he would
22 pay him \$5,000 cash and \$5,000 a week until he paid
23 a discount price for all the goods that were going
24 to be -- that were found there, which they had not
25 yet counted.

2 Mr. Pearson said that on -- no. On the
3 evening of August 30th, Mr. Kelly, the agent, looked
4 into the warehouse, over the window, and he saw goods
5 stacked up there, apparently more in order than they
6 were described as having been on the night of the
7 28th, when they were unloaded.

8 Mr. Pearson says that on August 31, he started
9 down to North Carolina the second time with his
10 second load.

11 That same day, 8 o'clock, August 31, Mr.
12 Kirschner got to his warehouse and began to unload
13 and Mr. Ertman got there very promptly thereafter
14 and they had three trucks, one of -- belonging to
15 each of them, and a rental truck and they figured
16 it would take about two trips to do it all.

17 Mr. Kelly started watching them, at least
18 as early as 9:30, and waited until he got a search
19 warrant. Then about 12:30, he and eight or ten
20 agents swooped in and they arrested Mr. Kirschner
21 and all the folks who were with them and took them
22 to the magistrate and had them booked and then took
23 Mr. Kirschner to the FBI.

24 He got back to his warehouse about 7:30.

25 He says he told the FBI at that time the same thing

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2 that he told on the witness stand here.

3 On the first of September, which I think
4 was a Friday, Mr. Kirschner testified that Mr. Rayll
5 called in to find out what progress they were making
6 in selling and Mr. Kirschner said, "I've been
7 arrested, it's not going so well."

8 On September 26th, which is something over
9 three weeks later, Rayll was arrested at his home
10 and Polito was arrested and I think Mr. Buttafuoco
11 and Mr. Pearson were probably arrested at the same
12 time, not by Mr. Kelly.

13 We did not have any testimony by the arresting
14 officers, and you can judge whether the delay in
15 arresting them is any indication that the story was
16 a fabrication by Mr. Kirschner and what effect you
17 are going to give to that delay. There is no
18 testimony with respect to it.

19 (Continued on next page.)

Notes follow

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Buttafuoco 1

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Charge

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THE COURT: (Continuing) A year later,

December 6, 1972, the charges against Ertman
and Mr. Kirschner's two employees were dismissed
by the Magistrate. They were never indicted.

March of 1973, March 7th of 1973,

Mr. Kirschner was in Mr. Schlam's office with
a lawyer and he got a letter promising him
immunity.

Now, this is not the normal type of
immunity. The statute provides that if a witness
will not testify, he can be brought before a
Judge and the Judge can say, "I will grant you
what is called testimonial immunity. You have
to testify but nothing that you say can be
used against you." Well, that would not have
done Mr. Kirschner much good, I suppose, because
they had caught him redhanded. They did not
need his testimony to help. So he got from the
prosecutor a promise not to prosecute.

Now, prosecutors have discretion whom
they are going to indict and you can determine
whether the promise not to indict was such an
inducement that it led Mr. Kirschner to thrash
out at some people who were not guilty and

1 2 Charge

2 accuse innocent people. But a prosecutor has
3 a right to make his selection as to whom to
4 indict and you can't just say, "I do not like
5 a witness to be granted immunity." You can
6 determine that you will not believe him but
7 you cannot say, as a matter of policy, "I am
8 not going to listen to that kind of testimony."
9 And just a few more things, general remarks.

10 There was testimony by Mr. Buttafuoco
11 that he got together with Mr. Polito and
12 Mr. Rayll and they tried to match their stories.

13 Now, that can be an innocent remark or
14 it can color your attitude toward their testimony.
15 You can decide on that.

16 Mr. Polito said he could not have been
17 at Mr. Kirschner's in the daytime as was testi-
18 fied because he always worked eight hours a day.
19 And that is one of the issues on which Mr. Schlam
20 brought in witnesses. He brought in Mr. Cavico
21 and Mr. Zeyock, who at that time owned Jones
22 Trucking Company, to say that they had seen
23 Mr. Polito at Rayburn Warehouse in the daytime
24 and that they had seen him with Mr. Pearson,
25 contrary to both their testimony that they did

not really know each other.

12 Mr. Pearson said he never saw Buttafuoco,
13 Polito or Rayll before this case. And if that
14 is true and he was not there that night, consider
15 that as a ground for dismissing as to him.

Now, Mr. Rayll's contention is not
exactly as Mr. Schlam described it. I think
Mr. Schlam was covering what other counsel had
said before Mr. Wales came back into the room
this morning, where there was an effort to give
a motive for Mr. Kirschner to lie with respect
to each of the defendants.

23 Mr. Rayll's contention is that the only
24 evidence connecting him to the stolen goods is
25 the testimony of Ira Kirschner, that Ira Kirschner's

1 4 Charge

2 testimony has not been corroborated as it
3 applies to Rayll, that Kirschner's testimony is
4 not credible because it comes from a tainted
5 source, from somebody who admits that he
6 dealt in stolen goods and who was not indicted
7 in this case and has every motive to shift some
8 of the blame in this case to others.

9 There was a reference to fingerprints.

10 There is not testimony in the case about
11 fingerprints as to whether you can get them
12 off the cases or why not or what affect it is.
13 You are going to decide the case on the evidence
14 before you and nothing else.

15 You can also decide on the absence of
16 evidence, so you may give some consideration to
17 that, if you determine it.

18 I think I might add, Mr. Pearson claims
19 there is no testimony by Mr. Kirschner that
20 Pearson knew the other people, except as he may
21 have been there on that evening. And Mr. Kirschner's
22 identification of Mr. Pearson may be a little
23 more questionable than his identification of the
24 others because the others he had met several
25 times, according to his testimony. Mr. Pearson

1 5 Charge

2 he said he met only that night. Although he
3 was there for five hours. He did say that he
4 was positive about it.

5 Now, whatever I have said does not indi-
6 cate that I am expressing any opinion on guilt
7 or innocence. I have tried to lay the facts
8 before you and let you judge them as judges
9 and on your recollection of the testimony.

10 Now, with respect to reaching a verdict,
11 when you go to the Jury Room, Mr. Rodder, who is
12 Juror No. 1, will be the foreman. He should
13 try to see that everybody gets a chance to
14 talk, that not too many people talk at once,
15 and guide you in determining when you begin to
16 take votes as to guilty or not guilty.

17 During your deliberations, you should
18 each assume the attitude of judges of the
19 fact, not partisans or advocates sticking up for
20 one party or the other. Acting as judges, you
21 will be making a high contribution to the admini-
22 stration of justice.

23 In determining guilt or innocence of the
24 defendants you are not to give any consideration
25 to the matter of punishment. This is exclusively

1 6 Charge

2 my responsibility, if there is a verdict of
3 guilty. I say your recollection of the
4 evidence governs.

5 If you want some of the testimony repeated,
6 this testimony has been transcribed and you can
7 request some of it to be read and I will call
8 you into Court and get counsel and parties
9 together and have it read to you.

10 If you want any of the exhibits that
11 have been received in evidence, you can ask for
12 them. Some have just been marked so that the
13 witness could look at them without being put
14 in evidence.

15 There will be a Marshal available outside
16 the Jury Room. You can report when you have
17 reached a verdict or he will let the Court
18 know if there are any questions you want to have
19 answered.

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THE COURT: (Continuing) You are each
entitled to your own opinions. Nobody should
reach a decision that is not his own. You
should change views, however, with your fellow
jurors, listen carefully with each other, not
hesitate to change your initial opinion if
you are convinced that somebody else's analysis
of the facts is better.

But any verdict must be unanimous. All
twelve must agree and no juror should give up
a conscientious belief in guilt or innocence in
order to reach a verdict. Counsel have a right
after I have completed my charge to take exceptions
and point out things that I have omitted or mis-
stated.

I may call you back, if there are things
that require that. Otherwise, you will be at
your job presently. I will have to excuse
Mrs. Brown. We have needed one alternate.
Fortunately, we did not need two.

Thank you for being here. You can get
whatever wraps you have in the juryroom and then
get your card from Mr. Giokas and go back down-
stairs, just report. I don't think you will be

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needed this afternoon.

Now, your oaths sum up your duty. That
is, without fear or favor to any man, you will
well and truly try the issues between these
parties, according to the evidence given you
in court and the laws of the U. S..

I will ask the Clerk now to swear the
Marshal.

(One male Marshal duly sworn by the
Clerk of the Court.)

THE COURT: Will you take this form of
verdict and give it to the foreman.

THE MARSHAL: Yes.

THE COURT: All right. You may retire.

(At 2:45 p.m., the jury retired to the
jury room and the following occurred in their
absence.)

THE COURT: All right.

MR. SCHLAM, are there any exceptions?

MR. SCHLAM: No, your Honor.

THE COURT: Mr. Currato?

MR. CURRATO: The defendant Buttatuoco
has no exceptions and no requests.

THE COURT: Mr. Verdixamo?

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MR. VERDIRAMO: No exceptions, your Honor.

THE COURT: Mrs. Seybert?

MRS. SEYBERT: None, your Honor.

THE COURT: Mr. Wales?

MR. WALES: Yes, I do, your Honor.

THE COURT: All right.

MR. WALES: I except to your Honor reading
Section 2 of Title 18, the aiding and abetting
section. I believe it is only confusing. Your
Honor read it properly and correctly, but it
is just not applicable to this particular case.
This is a simple actual possession case. And
it is not in any way with respect to any of the
defendants an aiding and abetting case.

The testimony of Kirschner was that each
of the four men on trial actually were in physical
possession of the goods on the night in question
and I think your Honor is -- charge could only
serve to confuse them and mislead them as to
the nature of the case.

THE COURT: Well, I've been over that
with you before.

MR. WALES: Yes.

THE COURT: And I disagree with you.

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There were probably various degrees of culpability,
if these defendants did it, as to who brought it.

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Mr. Polito and Mr. Pearson were perhaps
the ones who drove it there and tried to conceal
it. Mr. Pearson may have had a different motive.
He was just a truck driver, who may have known--

MR. WALES: Yes, but --

THE COURT: I think aiding and abetting
is a proper charge.

MR. WALES: The crucial point in Kirschner's
testimony, your Honor -- remember, this is not
a transportation case. This is a possession case.
Finally --

THE COURT: It's a receiving and conceal-
ment case. I was a little puzzled because my
previous possession cases have been under Section
459. This was 2315 and I'm not quite sure what
the significance is of the difference.

MR. SCHLAM: There really wasn't any
significance, your Honor.

THE COURT: I think they are overlapping
statutes.

MR. SCHLAM: Yes.

MR. WALES: We have a five-hour period.

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2 Kirschner told us about in which according
3 to his testimony, if the evidence is to be
4 believed, each of the five men were in actual
5 physical possession of the jury--- of the goods.

6 THE COURT: I charged joint possession.

7 MR. WALES: Right. That is the sum
8 and substance of the Government's case, as
9 charged in the indictment. And therefore, I
10 feel that when your Honor gives an aiding and
11 abetting, Section 2, it just confuses the
12 subject.

13 THE COURT: All right. I repeat my
14 denial of the exception.

15 MR. WALES: Okay.

16 With respect to your Honor also charged
17 that there are two kinds of possession, actual
18 and constructive. Well, of course, as a matter
19 of black letter law, I can't argue with you on that
20 but again it's just not applicable to the case.

21 This is a simple actual possession case.
22 The Government is not trying this case on the
23 theory of constructive possession.

24 THE COURT: Maybe I misunderstood the
25 request to charge on possession. I think it was

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2 all actual possession, if there was any.
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5 I don't see any harm in that.
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8 MR. WALES: Well, I think harmless
9 error is maybe something we have to worry
10 about when we get up to the Court of Appeals.
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13 THE COURT: I don't think it's error.
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16 MR. WALES: Right now when your Honor
17 has the opportunity to instruct this jury and
18 to correct this, I think -- I think the oppor-
19 tunity should be availed, your Honor, not be
20 passed up.
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23 THE COURT: Mr. Schlam, do you have
24 any feeling on that?
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27 MR. SCHLAM: No.
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30 THE COURT: I don't think that's harmful.
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33 MR. WALES: That's all.
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36 THE COURT: All right.
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39 We will wait until we hear from the
40 jury. I did not tell them, as I usually do,
41 let me know at 5:00 or 5:30 whether they are
42 going to want to stay over or come back tomorrow.
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45 If they have a question I will tell
46 them that.
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49 MR. WALES: Off the record.
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2 THE COURT: Off the record.

3 (Discussion off the record.)

4 THE COURT: All right, gentlemen.

5 (Recess taken.)

6 (Continued next page.)

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(The following took place in the absence
of the jury.)

THE COURT: Everybody is here in the court-
room. It is 3:45. I have a jury note. It is marked
court exhibit 2 which Mr. Giokas will read.

THE CLERK: "We would like to see the bill
and check for the radios purchased by Mr. Buttafuoco.
We want to see the check for the car and we want to
see the telephone toll receipt for August 28th."

THE COURT: And I have sent into the jury
exhibits A, C and G provided by the defendants, and
exhibits 4, 5, 6, 8 and 9 from the government.

I'm not sure how many other exhibits there
are. Perhaps it would be good to leave them here
in case there are any requests. Normally I do
ask counsel to agree they go in without delay.

Suppose counsel just take a few minutes to
check the exhibits, because the ones that are in
evidence are the ones -- the only ones that should
be provided. There aren't that many.

MR. SCHLAM: Here is 1. . Here is 3. Here
is 2.

Which other numbers do you have.

THE COURT: The government has had some

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photographs and the defendants had some work sheets.

3 THE CLERK: 10 are the documents.

4 THE COURT: And delivery receipts.

5 MR. SCHLAM: Here is another one.

6 THE CLERK: 18.

7 MR. SCHLAM: 18 are the photographs.

8 THE CLERK: 18 A.

9 MR. SCHLAM: 18. Right here.

10 THE CLERK: 19, shipping documents.

11 MR. SCHLAM: Right here.

12 THE CLERK: Photo of the warehouse.

13 MR. SCHLAM: 20. And 21.

14 We have them all, your Honor..

15 THE COURT: All right. Are there any other
16 defendants' exhibits.

17 MR. CURRATO: Just those three.

18 THE COURT: The defendant exhibits E and F,
19 where are they?

20 THE CLERK: I have them right here.

21 THE COURT: All right. Then we will recess
22 again. Everybody stay around. We don't know when
23 the jury will call again. Stay nearby.

24 (Recess taken.)

25 (Continued on next page.)

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(Time noted 4:20 P.M. o'clock.)

(The following took place in the absence
of the jury.)

THE COURT: All right, we are waiting for
Mr. Schlam.

(Whereupon, Mr. Schlam entered the court-
room.)

THE COURT: Mr. Schlam, I have a note from
the jury with a request to recess for the day,
asking what time do we report tomorrow.

I have never excused a jury this early, but
I will see if they think that they can reach a
verdict by staying another hour, and if no I will
let them go.

MR. SCHLAM: Well, I certainly understand
their point. I would just as soon recess myself.

THE COURT: All right. Bring them in.

(Whereupon, the jury entered the courtroom.)

THE COURT: Mr. Rodner, I have your note
saying that you request a recess for the day.

FOREMAN: Yes sir.

THE COURT: And it brought up an interesting
question that I never thought of, which is why we
keep jurors when they are deliberating later than

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2 when they are listening to testimony. I suppose
3 the reason is that when you are in the process of
4 a trial lawyers always have something to do after
5 4:30 to get ready for the next day. And when it's
6 in the hands of the jury, you're doing all the
7 work and they want to get it decided.

8 Do you think if you stayed for another half
9 hour or so you would decide it tonight.

10 FOREMAN: I think that is impossible, your
11 Honor.

12 THE COURT: All right. Normally, I have
13 juries stay until 5 or 5:30. But if you want to
14 take a recess for the day -- you think that won't
15 do it.

16 FOREMAN: I don't think -- the reason why
17 we came to that conclusion was because I don't think
18 that we can come to any kind of a decision today.

19 THE COURT: All right. And I suppose some
20 of you may have made plans figuring we do end at
21 4:30 usually.

22 Now, of course, tomorrow morning, could you
23 all get here at 9:30.

24 FOREMAN: Surely.

25 THE COURT: Suppose you report at 9:30.

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2 Do they have to go downstairs?

3 THE CLERK: If they want to.

4 THE COURT: All right. You can come straight
5 here at 9:30. Don't begin talking about the case
6 until all twelve are here because the deliberations
7 are by all twelve people.

8 You are at a crucial stage now. In the old
9 days jurors used to be kept without food or heat
10 until they reached a verdict.

11 FOREMAN: That's punishment.

12 THE COURT: And if the Judge rode on a
13 circuit they were carried around in a cart behind
14 him. We trust you now not to talk about the case
15 among yourselves or with anyone else. Don't do
16 any private investigation. Remember, it's an im-
17 portant matter. You have heard the evidence. You
18 have heard the arguments. You have heard my in-
19 structions. And that's what is supposed to guide
20 you.

21 Come back at half past nine and we will be
22 ready for whatever questions or report you have to
23 make.

24 FOREMAN: Thank you very much.

25 THE COURT: Mark this as a court exhibit

Certificate of Service

March 14, 1974

I certify that a copy of this brief and appendix has been mailed to the Acting United States Attorney for the Eastern District of New York.

Ruth Bloch Bludger